IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 19, 2002

STATE OF TENNESSEE v. JACOB DYCK

Appeal from the Criminal Court for Monroe County
No. 99-045 Carroll Ross, Judge

No. E2001-00476-CCA-R3-CD Filed April 22, 2002

The Defendant, Jacob Dyck, was convicted by a jury of theft of property valued over $10,000 but less than $60,000, a Class C felony. See Tenn. Code Ann. § 39-14-105(4). The trial court sentenced him to six years in the Department of Correction. In this appeal the Defendant raises five issues: 1) whether the trial court erred in denying him his right to self-representation; 2) whether the State failed to elect the offense for which it was seeking a conviction; 3) whether a material variance exists between the indictment and the proof at trial; 4) whether the evidence is sufficient to support his conviction; and 5) whether the Defendant's sentence is excessive. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Steve McEwen, Mountain City, Tennessee, for the appellant, Jacob Dyck.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Chal Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

James Hagermeyer, the victim in this case, testified that he and his wife had known the Defendant approximately fourteen years. The Defendant had been Mr. and Mrs. Hagermeyer's dentist and a close, family-like relationship had developed. As a result of this relationship, Mr. Hagermeyer gave the Defendant a key to his house.

On June 3, 1998, Mrs. Hagermeyer died. "Shortly after" her death, Mr. Hagermeyer loaned the Defendant his 1987 Lincoln Towncar, bearing the "vanity" licence plate "BPOLLEN." The

Defendant was supposed to return this car to the victim by October 15, 1998. Mr. Hagermeyer testified that this car was worth $6,000.

The Hagermeyers had invested in gold and silver coins over the course of many years. After Mrs. Hagermeyer's death, Mr. Hagermeyer turned several sacks of these coins over to the Defendant.[1] The Defendant was to sell the coins to a dealer and turn the proceeds over to Mr. Hagermeyer. Mr. Hagermeyer testified that these coins were worth approximately $10,000.

Mr. Hagermeyer testified that the Defendant never returned the Lincoln to him, and never delivered any proceeds from the coins; nor did the Defendant ever return the coins themselves.

Mr. Hagermeyer also testified that he had placed coins costing $21,000 under a false floor in his bathroom. When he returned from a trip out of town in August of 1998, he discovered that these coins were missing. When asked about this episode, Mr. Hagermeyer testified that the Defendant knew when he would be out of town, that the Defendant had access to his house, and that the Defendant had access to a metal detector. He further testified that he had not given the Defendant permission to remove any items from his house, and that he had never gotten back any of the items removed from his house.

James Grant, a Tennessee State Trooper, testified that he stopped the Defendant on September 7, 1998, for driving with an inoperative headlight. The Defendant was driving a Lincoln, license plate "BPOLLEN." In the car was a sack of silver coins. Trooper Grant arrested the Defendant after discovering that the Defendant's driver's license had been suspended. The Defendant was allowed to "check" the sack of coins at the jail upon his arrival, and allowed to check it back out when he posted bail. The sack of coins was never recovered. At the time Trooper Grant arrested the Defendant, the Lincoln had not been reported stolen.

In his first issue, the Defendant complains that the trial court violated his constitutional right to represent himself at trial. At the commencement of the trial, the trial court explained during jury selection that the Defendant was represented by Mr. William Donaldson. At that point, the Defendant stated, "I object. I do not have a lawyer. I object to these proceedings. I do not consent to this. I do not assent to this. I do not acknowledge, I do not appear, and I do not understand." A short time later, the Defendant stated that he had the right to represent himself. The trial court then acknowledged that the Defendant had previously requested to represent himself, but had "steadfastly and repeatedly refused to answer" the questions necessary to establish that the Defendant was waiving his right to legal counsel. Some further conversation ensued during which the Defendant claimed that he was "not the corporate entity that you are trying to try." Defense counsel then asked the Defendant if he would answer the court's questions, and the Defendant stated, "No."

[1] Mr. Hagermeyer did not testify as to any specific dates on which he entrusted coins to the Defendant. However, the record supports the inference that this course of conduct began after Mrs. Hagermeyer died.

Accordingly, the trial court refused to grant defense counsel's motion to withdraw, and the trial proceeded with Mr. Donaldson serving as defense counsel.

We acknowledge that an accused has the constitutional right to represent him or herself at trial. See U.S. Const. amend VI; Tenn. Const. art. I, § 9; Faretta v. California, 422 U.S. 806, 818-20 (1975). An accused may exercise his or her right to self-representation upon the satisfaction of three prerequisites:

(1) The accused must timely assert the right to self-representation;

(2) the exercise of the right must be clear and unequivocal; and

(3) the accused must knowingly and intelligently waive the right to assistance of counsel.

State v. Herrod, 754 S.W.2d 627, 629-30 (Tenn. Crim, App. 1988). Here, the State concedes that the Defendant timely asserted his right to self-representation, and the record makes clear that the exercise was clear and unequivocal. Resolution of this issue depends, then, on whether the Defendant knowingly and intelligently waived his right to counsel.

As this Court has previously noted, "[w]hen an accused desires to proceed pro se, the trial judge must conduct an intensive inquiry as to his ability to represent himself." Smith v. State, 987 S.W.2d 871, 875 (Tenn. Crim. App. 1998). This inquiry should be based on the guidelines contained in 1 Bench Book for United Stated District Judges 1.02-2 to -5 (3d ed. 1986). See id. These guidelines are set forth in appendices to both the Smith case and United States v. McDowell, 814 F.2d 245, 251-52 (6th Cir. 1987). Our Rules of Criminal Procedure also require that,

> [b]efore accepting such waiver [of the right to counsel] the court shall first advise the accused in open court of the right to the aid of counsel in every stage of the proceedings. The court shall, at the same time, determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate. Any waiver accepted shall be spread upon the minutes of the court and made a part of the record of the cause.

Tenn. R. Crim. P. 44(a).

The record in this case demonstrates clearly that the trial court attempted to conduct the appropriate inquiry, and the Defendant refused to cooperate. Given that the Defendant deliberately stymied the trial court in its attempt to establish the Defendant's knowing and intelligent waiver, the Defendant will not now be heard to complain about the trial court's refusal to grant his request. Cf. State v. Carruthers, 35 S.W.3d 516, 549 (Tenn. 2000) (holding that a defendant "may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings.") This issue is without merit.

The Defendant next contends that his conviction must be reversed and this matter remanded for a new trial because the State introduced evidence of two separate offenses, but was not required

to elect upon which offense it was relying for a conviction. As our supreme court has recently reiterated,

> the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim. The election requirement safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence.

State v. Johnson, 53 S.W.3d 628, 630-31 (Tenn. 2001) (citations omitted). In addition to protecting an accused's right to a unanimous jury verdict, the election requirement also enables the accused to prepare for and make his or her defense to the specific offense charged, and protects the accused from double jeopardy by individualization of the issue. See State v. Brown, 762 S.W.2d 135, 137 (Tenn. 1988). While our supreme court has recognized that "the election requirement has been applied almost exclusively in the sex crimes context," Johnson, 53 S.W.3d at 631, the court has not limited application of the election requirement to sex crimes. Obviously, the concerns addressed by the election requirement are not limited to prosecutions for sex offenses. Indeed, this Court has previously recognized the necessity of an election in a case involving reckless endangerment. See State v. Terry Lee Johnson, No. W2000-00749-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 956, at **9-10 (Jackson, Dec. 14, 2000). Accordingly, we conclude that, where a defendant is charged with a single theft offense, but the State introduces proof of more than one distinct theft offense, the State is required to elect upon which proved offense it is relying for a conviction.

However, separate theft offenses may be aggregated into a single charge. "[A]ggregation of value of stolen property taken in separate thefts is permitted when separate acts of theft are: (1) from the same owner; (2) from the same location; and (3) are pursuant to [a] continuing criminal impulse or a single sustained larcenous scheme." State v. Cattone, 968 S.W.2d 277, 279 (Tenn. 1998) (emphasis in original). The issue in this case, then, is whether the State charged and proved two theft offenses that were aggregated into a single count, or whether the State charged a single offense but proved two separate offenses. If the State engaged in the former course of conduct, no election was necessary; if, however, the State engaged in the latter course of conduct, an election was required.

The single count indictment in this case provides that the Defendant

> on or about the 15th day of October, 1998, in Monroe County, Tennessee, and before the finding of this indictment, did unlawfully and intentionally or knowingly obtain or exercise control over certain property, to-wit: One (1) 1987 Lincoln and approximately twenty-five thousand ($25,000) dollars in silver and gold, over $10,000 but less than $60,000 in value, of James Hage[r]meyer without his effective consent, with intent to deprive the said James Hage[r]meyer thereof, in violation of T.C.A. 39-14-103 . . . .

The proof at trial established that the victim's wife died on June 3, 1998. "Shortly after" this time, the victim loaned his 1987 Lincoln to the Defendant. The Defendant was to return the car by October 15, 1998. At different times, the victim also entrusted three to four bags of silver coins to the Defendant, totaling approximately $10,000 in value. The Defendant was to negotiate a transaction with a coin dealer for these coins, and deliver the proceeds to the victim.

In August of 1998, the victim went out of town for a few days. While he was gone, someone entered his house and removed the coins hidden under the false floor. Mr. Hagermeyer implicated the Defendant in the theft by testifying that the Defendant knew when he was out of town; had a key to his house; and had access to a metal detector which would reveal where gold and silver coins were hidden. Upon discovering the theft, Mr. Hagermeyer spoke with TBI agent Larry Brakebill, but no charges were filed at that time. Charges were not filed until November of 1998, when the Defendant had failed to return the car or to deliver to Mr. Hagermeyer any coins or proceeds from the sale of coins.

The Defendant argues that the October 15 date specified in the indictment refers to the theft of the car and the coins entrusted to the Defendant, and that the August theft of coins from the victim's house constitutes a separate and distinct crime not encompassed by the indictment. We must respectfully disagree. The October 15 date does not refer to the date the Defendant actually committed any particular theft of coins; rather it refers to the date by which the Defendant was supposed to have returned the victim's car. A theft of property is committed when "with intent to deprive the owner of property, the [accused] knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103. Although the Defendant had Mr. Hagermeyer's consent to exercise control over the coins which Mr. Hagermeyer delivered to him, that consent was conditional upon the Defendant's negotiating the coins and delivering the proceeds to Mr. Hagermeyer. The Defendant never acted within the scope of Mr. Hagermeyer's consent. Therefore, the Defendant's exercise of control over the coins entrusted to him was <u>not</u> with the owner's <u>effective</u> consent, and the theft was committed upon delivery of the coins to the Defendant. With respect to the coins taken from beneath the false floor in Mr. Hagermeyer's house, no consent was ever given for that taking, and that theft was therefore complete upon removal of the coins from the house.

Thus, the thefts of the coins occurred at different times over the course of the summer of 1998. The State chose to aggregate these thefts into a single count, as it had the right to do. All of the thefts of the coins were from the same owner, from the same location, and pursuant to a single sustained larcenous scheme. The several thefts of coins were encompassed by the indictment, and no election was therefore required. This issue is without merit.

The Defendant next contends that the proof of the theft of coins from beneath the false floor "presents a material variance from the allegations in the indictment, given the date and value of the property as alleged in the indictment." The Defendant points to proof that the theft from beneath the floor occurred in August of 1998, while the indictment refers to an October 15, 1998 theft, and that

Mr. Hagermeyer testified at one point that the value of the coins taken from his house was $90,000, while the indictment alleges coins worth $25,000.

Our supreme court has held that

> a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense; all other variances must be considered to be harmless error.

State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). As set forth above, the indictment in this case aggregated the Defendant's thefts of Mr. Hagermeyer's property. Although there was some inconsistent testimony about the value of the coins taken from beneath the bathroom floor, we do not believe that the valuation of the coins set forth in the indictment would have misled the Defendant as to what thefts he was charged with. Because Mr. Hagermeyer testified that the coins he entrusted to the Defendant were worth $10,000, the Defendant had to know from the indictment that he was being charged with the theft of more than the entrusted coins. Furthermore, because we find that the indictment encompassed the Defendant's theft of more than the entrusted coins -- that is, the indictment encompasses both that theft and the theft from the victim's house in August -- we find that the indictment protects the Defendant from a second prosecution for the August theft. Accordingly, any alleged variance neither misled the Defendant in his preparation for trial, nor presented a danger that the Defendant could be prosecuted a second time for the same offense. Any alleged variance is therefore harmless error, and this issue is without merit.

In his next issue the Defendant challenges the sufficiency of the evidence in support of his conviction. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs, 995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. See Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and

value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

As set forth above, a person commits the offense of theft "if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103. The Defendant in this case was charged with, and convicted of, theft of property valued at $10,000 or more but less than $60,000. See id. § 39-14-105(4). Thus, the Defendant was convicted of a Class C felony. Id.

Mr. Hagermeyer testified that he loaned a car to the Defendant valued at $6,000, which the Defendant never returned. Mr. Hagermeyer also testified that he entrusted $10,000 worth of coins to the Defendant for the Defendant to negotiate with a coin dealer, and the Defendant never delivered the proceeds of the transaction to Mr. Hagermeyer, nor did the Defendant return the coins to Mr. Hagermeyer. This evidence alone is sufficient to support the Defendant's conviction.

In his final issue, the Defendant asserts that the trial court erred in sentencing him to the maximum term of six years, and in denying his request for probation. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Defendant was sentenced as a Range I standard offender. The Range I sentence for a Class C felony is three to six years. See Tenn. Code Ann. § 40-35-112(a)(3). The presumptive sentence for a Class C felony is the minimum sentence in the range, increased as appropriate for

enhancement factors, and decreased as appropriate for mitigating factors. See id. § 40-35-210(c), (e). In sentencing the Defendant to the maximum term of six years, the trial court relied on three enhancement factors: the victim was particularly vulnerable because of age or physical or mental disability; the amount of property taken from the victim was particularly great; and the Defendant abused a position of private trust. See id. § 40-35-114(4), (6), (15). The trial court found that no mitigating factors applied.

The Defendant contests application of each of the enhancement factors. He contends that there is not sufficient proof on the record to support the trial court's finding that the victim was particularly vulnerable due to age or physical or mental disability. We respectfully disagree. Danny Isbill, the probation officer who prepared the Defendant's presentence report, testified that Mr. Hagermeyer was in his eighties. Additionally, Mr. Hagermeyer testified at trial that he signed a document dictated to him by the Defendant that he "knowed [sic] damn well . . . wasn't right." Mr. Hagermeyer explained his acquiescence to this writing as follows:

> I did it because it just seemed like I had a spell and I wanted to please him. . . . I don't know whether, whether he had me hypnotized or what. . . . The only thing is, I don't know what power he had. He's a con man, I know now, but at that time I believed every damn thing he said.

In State v. Adams, our supreme court provided a framework for application of the enhancement factor for particular vulnerability:

> [T]he vulnerability enhancement relates more to the natural physical and mental limitations of the victim than merely to the victim's age. . . . The factor can be used . . . if the circumstances show that the victim, because of his age or physical or mental condition, was in fact 'particularly vulnerable,' i.e., incapable of resisting, summoning help, or testifying against the perpetrator.

864 S.W.2d 31, 35 (Tenn. 1993) (emphasis added). We conclude that the proof in this case is sufficient, although perhaps marginally so, to support the trial court's finding that Mr. Hagermeyer was particularly vulnerable. See State v. Poole, 945 S.W.2d 93, 97 (Tenn. 1997) ("The evidence need not be extensive and additional weight may be given to the age of the victim in those cases where a victim is extremely young or old.") Accordingly, we find that the trial court did not err in applying this enhancement factor.

The Defendant also challenges the trial court's application of factor (6), that the amount of property taken from the victim was particularly great. The Defendant asserts that, because the felony class of theft offenses is based upon the amount of property taken, use of this factor would be a prohibited double enhancement. As a general rule, the Defendant is correct. See State v. Grissom, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997). However, this Court has also recognized that, where the amount stolen is over four times the amount necessary to qualify for the conviction class of theft, enhancement on this basis is proper. See State v. Brenda Kay Keefer, No. 03C01-9709-CC-00413,

1999 Tenn. Crim. App. LEXIS 124, at *7 (Knoxville, Feb. 10, 1999). Here, the Defendant was convicted of Class C theft, requiring a theft of at least $10,000 but less than $60,000. The proof at trial established a theft of at least $37,000: a $6,000 car, $10,000 of coins entrusted to the Defendant, and coins taken from the house costing $21,000. However, there was also proof that the coins taken from the house had a present value of $90,000: establishing a theft totaling $106,000, sufficient to support a Class B theft conviction. See Tenn. Code Ann. § 39-14-105(5).[2] Accordingly, we hold that application of this factor was proper under the circumstances of this case.

The Defendant also challenges the trial court's use of factor (15), that the Defendant abused a position of private trust. The Defendant contends that his sentence cannot be enhanced on this basis because proof of his position of trust was also used to prove his commission of the crime. The Defendant cites no authority for this proposition, and it is therefore waived. See Tenn. Ct. Crim. App. R. 10(b). Moreover, it is without merit. The Defendant's abuse of his position of private trust is not an element of the offense of theft, and application of this factor was proper.

The Defendant further argues that the trial court should have applied as mitigating factors that his criminal conduct neither caused nor threatened serious bodily injury, and that he does not have a prior criminal record. See Tenn. Code Ann. § 40-35-113(1), (13). We agree that the proof supports application of these mitigating factors. We conclude, however, that they are entitled to negligible weight when compared to the applicable enhancement factors. We affirm the length of the sentence set by the trial court.

Finally, the Defendant contends that the trial court should have granted him probation. A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6); State v. Lane, 3 S.W.3d 456, 462 (Tenn. 1999). Guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing can be found in Tennessee Code Annotated § 40-35-103(1), which sets forth the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

See State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000); State v. Ashby, 823 S.W.2d 166, 170 (Tenn. 1991).

---

[2]The Range I sentencing range for a Class B theft is eight to twelve years. See Tenn. Code Ann. § 40-45-112(a)(2).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. See id. § 40-35-103(5).

A defendant is eligible for probation if the actual sentence imposed upon the defendant is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. Tenn. Code Ann. § 40-35-303(a). Probation is to be automatically considered as a sentence alternative for eligible defendants; however, the burden of proving suitability for probation rests with the defendant. Id. § 40-35-303(b).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, including physical and mental condition; the deterrent effect on the defendant; and the likelihood that probation is in the best interests of both the public and the defendant. See Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974); State v. Kendrick, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). If the court determines that a period of probation is appropriate, it shall sentence the defendant to a specific sentence but then suspend that sentence and place the defendant on supervised or unsupervised probation either immediately or after the service of a period of confinement. See Tenn. Code Ann. §§ 40-35-303(c), -306(a).

The trial court denied probation on the basis that confinement is necessary to avoid depreciating the seriousness of the offense, or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses. See id. § 40-35-103(1)(B). Additionally, the trial court noted the Defendant's repeated refusal to work with "any attorney" the trial court had provided; his refusal to provide information to probation officers relative to his presentence report; and the Defendant's behavior in court which the trial judge characterized as aimed at "subvert[ing] the process." The trial court specifically found that the Defendant had "shown [him]self not to be amenable to any alternative program that we have."

The record supports the trial court's conclusions. The Defendant did not carry his burden of proving that he should receive probation, and the trial court did not err or abuse his discretion in denying the Defendant's request. This issue is without merit.

The judgment of the trial court is accordingly affirmed.

_____

DAVID H. WELLES, JUDGE